

JUN 25 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

HECTOR MOLINA ALIBUTOD,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 02-71636

INS No. A92-775-686

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted May 9, 2003
Pasadena, California

Before: BROWNING, B. FLETCHER, and SILVERMAN, Circuit Judges.

Hector Molina Alibutod, a native and citizen of the Philippines, petitions for review of a Final Administrative Removal Order finding Alibutod removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony in the form of a theft offense as defined by INA §

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). The removal ordered was issued to Alibutod pursuant to expedited removal proceedings under INA § 238(b), 8 U.S.C. § 1228(b). We dismiss the petition for review for lack of jurisdiction.

Under 8 U.S.C. § 1252(a)(2)(C), this Court lacks jurisdiction to review a final order of removal against an alien who is removable for having been convicted of an aggravated felony. However, this Court retains jurisdiction to determine whether the jurisdictional bar applies. *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002). This Court reviews *de novo* the threshold issue whether a particular offense constitutes an aggravated felony. *Park v. INS*, 252 F.3d 1018, 1021 (9th Cir. 2001). Because the parties are familiar with the facts, we will not recount them in detail except as necessary.

In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), we held that the term “theft offense” under 8 U.S.C. § 1101(a)(43)(G) means “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Id.* at 1205 (quoting *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1009 (7th Cir. 2001)). To determine whether a conviction falls within this definition of theft offense, we first use a categorical approach in which we compare the statute of conviction to the

generic definition of theft offense. If the statute of conviction criminalizes conduct that goes beyond the generic definition, then the statute of conviction does not facially qualify as a theft offense that is an aggravated felony. *See Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-87 (9th Cir. 2003). The Court then looks to see, under a modified categorical approach, whether documentation or other judicially noticeable facts in the record indicate that the petitioner was actually convicted of the elements of the generically defined theft offense. *Id.* at 887.

On May 1, 2000, Alibutod pleaded guilty in the Superior Court of California to grand theft under California Penal Code § 484e(b). Section 484e, titled “Theft of access cards or account information,” reads as follows:

- (a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder’s or issuer’s consent, is guilty of grand theft.
- (b) *Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft.*
- (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder’s or issuer’s consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.

- (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

Cal. Penal Code § 484e (emphasis added).

Under the categorical approach, Alibutod's conviction for grand theft under section 484e(b) qualifies as a theft offense, and thus, an aggravated felony. All subsections require the offender to take or exercise control over an access card or access card account information. An "access card" is defined as "any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument." Cal. Penal Code § 484d(2).

Cards, plates, codes, numbers, and information are all forms of property, tangible and intangible. Furthermore, subsections (a), (c), and (d), which are incorporated by subsection (b), all require that access cards be sold, transferred, conveyed, acquired, or retained "without the cardholder's or issuer's consent." Finally, subsections (a), (c), and (d) all require the offender to act "with the intent to defraud" or "with the intent to use [access card account information] fraudulently." Subsection (b) requires the offender to "[have] reason to know"

that the access cards were taken or retained under circumstances that would constitute a violation of subsection (a), (c), or (d), thereby incorporating the criminal intent requirement. *See also Randhawa*, 298 F.3d at 1154. Section 484b as a whole does not criminalize conduct that goes beyond the generic definition of theft offense, and therefore, qualifies as a theft offense under the categorical approach.

Section 1101(a)(43)(G) defines an aggravated felony as “a theft offense . . . for which the term of imprisonment [is] at least one year.” 8 U.S.C. § 1101(a)(43)(G). Alibutod argues that he is not an aggravated felon as defined under § 1101(a)(43)(G) because the INS failed to establish that he was sentenced to at least one year in prison for his grand theft conviction. This is incorrect. At the time Alibutod pleaded guilty to grand theft, he also pleaded guilty to possession of a controlled substance. He was sentenced to a prison term of one year and four months for *each* conviction, both sentences to be served concurrently.

Because Alibutod’s grand theft conviction qualifies as a theft offense and an aggravated felony warranting removal under 8 U.S.C. § 1227(a)(2)(A)(iii), we lack jurisdiction over Alibutod’s petition for review. 8 U.S.C. § 1252(a)(2)(C). Where we lack jurisdiction to review a petitioner’s removal order under 8 U.S.C. §

1252(a)(2)(C), we also lack jurisdiction to consider the petitioner's constitutional claims. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1070 (9th Cir. 2003).

PETITION FOR REVIEW DISMISSED.